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DEPARTMENT OF JUSTICE
Antitrust Division

United States v. Zen-Noh Grain Corporation, et al.
Response to Public Comments

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h), the United States hereby publishes below the Response to Public Comments on the Proposed Final in *United States v. Zen-Noh Grain Corporation, et al*., Civil Action No. 1:21-cv-01482-RJL, which was filed in the United States District Court for the District of Columbia on August 30, 2021, together with a copy of the two comments received by the United States.

A copy of the comments and the United States' response to the comments is available at https://www.justice.gov/atr/case/us-v-zen-noh-grain-corp-and-bunge-north-america-inc. Copies of the comments and the United States' response are available for inspection at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may also be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Suzanne Morris,
Chief, Premerger and Division Statistics,
Antitrust Division.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. ZEN-NOH GRAIN CORP., and BUNGE NORTH AMERICA, INC., *Defendants*.	Civil Action No.:1:21-cv-01482 (RJL)

RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), 15 U.S.C. § 16, the United States hereby responds to the two public comments received regarding the proposed Final Judgment in this case. After careful consideration of the submitted comments, the United States continues to believe that the divestiture required by the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is therefore in the public interest. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this response have been published as required by 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On April 21, 2020, Zen-Noh Grain Corp. ("ZGC") agreed to acquire 35 operating and 13 idled U.S. grain elevators from Bunge North America, Inc. ("Bunge") ("collectively, "Defendants") for approximately $300 million ("the Transaction"). The United States filed a civil antitrust Complaint on June 1, 2021, seeking to enjoin the

proposed Transaction. The Complaint alleges that the likely effect of the Transaction would be to substantially lessen competition for purchases of corn and soybeans in nine geographic areas of the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. *See* Dkt. No.1.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and an Asset Preservation and Hold Separate Stipulation and Order ("Stipulation and Order") in which the United States and Defendants consent to entry of the proposed Final Judgment after compliance with the requirements of the APPA. *See* Dkt. Nos. 2–2, 2–1. The proposed Final Judgment requires the Defendants to divest certain grain elevators and related assets of Bunge or ZGC affiliate CGB Enterprises, Inc. ("the Divestiture Assets") to Viserion Grain LLC and Viserion International Holdco LLC ("Viserion"), or to another acquirer or acquirers acceptable to the United States, within 30 calendar days after entry of the Stipulation and Order.

Pursuant to the APPA's requirements, on June 1, 2021, the United States also filed a Competitive Impact Statement describing the transaction and the proposed Final Judgment. *See* Dkt. No. 3. On June 8, 2021, the United States published the Complaint, proposed Final Judgment, and Competitive Impact Statement in the *Federal Register*, *see* 86 Fed. Reg. 30479 (June 8, 2021), and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in *The Washington Post* and *St. Louis Post-Dispatch*, from June 4, 2021, through June 10, 2021. On July 1, 2021, the Court entered the Stipulation and Order. *See* Dkt. No. 14. On July 7, 2021, Defendant ZGC effectuated the divestiture contemplated by the proposed Final Judgment by selling the prescribed assets to Viserion. The 60-day period for public comment ended on August, 9, 2021. The United States received two comments, attached as Exhibits A and B.

II. THE COMPLAINT AND THE AMENDED PROPOSED FINAL JUDGMENT

The Complaint alleges that ZGC's proposed acquisition of certain grain elevator assets from Bunge would likely eliminate competition between the Defendants to purchase grain from farmers in numerous markets along the Mississippi River and its tributaries. In particular, the Complaint alleges that in nine geographic areas, a Bunge river elevator and a nearby ZGC (or ZGC affiliate CGB) elevator represent two of only a handful of grain purchasing alternatives for area farmers. In those nine geographic areas, ZGC and Bunge currently compete aggressively to win farmers' business by offering better prices and more attractive amenities such as faster grain drop-off services and better grain grading. Unless remedied, the Transaction will eliminate competition between ZGC and Bunge in those locations in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The proposed Final Judgment is designed to remedy the likely harm to competition alleged in the Complaint by requiring a divestiture that will establish an independent, economically viable competitor for the purchase of corn and soybeans in the nine affected geographic markets. The proposed Final Judgment requires the Defendants to divest nine elevators within 30 days after the entry of the Stipulation by the Court to Viserion or another acquirer or acquirers approved by the United States. In each of those nine geographic markets, a Bunge elevator competes head to head with one or more ZGC or CGB elevators.

The Divestiture Assets include the real property, buildings, facilities, and other structures associated with the nine grain elevators. The Divestiture Assets also encompass all existing grain inventories at the elevators, and all contracts and other agreements that relate exclusively to the elevators that will be divested.

The Divestiture Assets must be divested in such a way as to satisfy the United States in its sole discretion that the assets can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the market for the purchase of

corn and the market for the purchase of soybeans. The Defendants proposed Viserion as the acquirer, and, after rigorous evaluation, the United States approved Viserion as the divestiture buyer.

The proposed Final Judgment allows the acquirer, at its option, to enter into a transition services agreement with Defendants for a period of up to six months. As explained in the Competitive Impact Statement, the transition services covered by the proposed Final Judgment are those that might reasonably be necessary to ensure that an acquirer or acquirers can readily and promptly use the assets to compete in the relevant markets. *See* Dkt. No. 3 at 10 at 12.

III. STANDARD OF JUDICIAL REVIEW

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in

APPA settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted).

"The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements,"

contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id*.

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (quoting *W. Elec. Co*., 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the

complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237, § 221, and added the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the APPA). This language explicitly wrote into the statute what Congress intended when it first enacted the APPA in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

IV. SUMMARY OF THE COMMENTS AND THE UNITED STATES' RESPONSE

The United States received two public comments in response to the proposed Final Judgment: one from Missouri Attorney General Eric Schmitt and another from Mr. Mark Calmer, an Iowa farmer and small agricultural business owner. Consistent with the allegations in the United States' Complaint, both comments express concern that ZGC's

proposed acquisition of certain Bunge elevators will reduce competition for the purchase of soybeans and corn along the Mississippi River. Missouri Attorney General Schmitt's comment expresses support for the divestiture outlined in the proposed Final Judgment. Mr. Calmer's comment does not express concerns about the adequacy of the divestiture outlined in the proposed Final Judgment nor concerns with Viserion as the proposed acquirer.

In his comment, Missouri Attorney General Schmitt emphasizes that, as highlighted in the Complaint, the Transaction would "eliminat[e] crucial competition" for the purchase of grain from farmers in Southeast Missouri. Attorney General Schmitt further states his support for the proposed Final Judgement, noting that "[i]f entered, the proposed judgment would replace the competition between Zen-Noh and Bunge by establishing an independent player in the market that will compete for the purchase of grain. This competition will help ensure that Missouri's farmers receive a fair price for the crops that they sell." *See* Exhibit A.

Mr. Calmer, a farmer located in Manson, Iowa, expresses concern about increasing concentration in a number of agricultural markets, including the grain export, beef packing, fertilizer and chemical, and seed industries. With respect to grain elevator operations along the Mississippi River, Mr. Calmer states that if the Transaction goes through, it will greatly reduce competition for grain purchases. Mr. Calmer does not discuss the terms of the proposed Final Judgment. *See* Exhibit B. The proposed Final Judgment will preserve competition for the purchase of grain: where ZGC and Bunge elevators have overlapping draw areas with few competitors, one of their facilities will be divested. In Iowa, for example, the parties are selling Bunge's elevator in McGregor to an independent competitor to maintain competition for farmers in that area.

Nothing in either comment warrants a change to the proposed Final Judgment or supports a conclusion that the proposed Final Judgment is not in the public interest. As

required by the APPA, the comments, with the authors' contact information removed, and this response will be published in the *Federal Register*.

V. CONCLUSION

After careful consideration of the public comments, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is therefore in the public interest. The United States will move this Court to enter the Final Judgment after the comments and this response are

published as required by 15 U.S.C. § 16(d).

Dated: August 30, 2021

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

_____
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ATTORNEY GENERAL OF MISSOURI
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July 15, 2021

VIA ELECTRONIC MAIL

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Re: *United States v. Zen-Noh Grain Corporation and Bunge North America, Inc.*, No. 1:21-cv-01482, Comments of Missouri Attorney General Eric Schmitt

Dear Mr. Lepore:

The farmers of Missouri rely on robust competition among purchasers of grain to obtain fair compensation for their crops. Without robust competition, the farmers' livelihood and their ability to continue supplying vital crops to our country are threatened.

The proposed acquisition by Zen-Noh Grain Corporation ("Zen-Noh") of grain elevators from Bunge North America, Inc. ("Bunge") poses an existential threat to the farmers of Missouri by eliminating crucial competition between Zen-Noh and Bunge for the purchase of corn and soybeans. Missouri farmers have expressed concern that, post-acquisition, Zen-Noh would control seven consecutive grain terminals along the lower Mississippi River. Indeed, as the Antitrust Division notes in its Complaint, the acquisition would concentrate 95% (in 2019) of Pemiscot County's corn and soybean output within one buyer. In short, by eliminating one of the few buyers of grain in the Missouri Bootheel, the acquisition will lead to lower prices paid to Missouri farmers.

In light of the unacceptable threat to competition posed by the acquisition, I write on behalf of my constituents in Southeast Missouri to express my support for the proposed divestiture of grain elevators to a suitable buyer. If entered, the proposed judgment would replace the competition between Zen-Noh and Bunge by establishing an independent player in the market that will compete for the purchase of grain. This competition will help ensure that Missouri's farmers receive a fair price for the crops that they sell.

I respectfully request that the Court enter the proposed judgment to restore competition for the purchase of grain in Southeast Missouri.

Respectfully submitted,

Eric Schmitt
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Dear Sir,
Thank you for inviting me as a farmer and Ag business owner to submit my concerts and comments to your department as invited in an article in the High Plains Journal dated June 7, 2021 regarding the Department of Justice and Zen-Noh. I appreciate your time and attention to this critical matter.

I started farming in 1972. We are an Iowa farming operation. Our background includes approximately 5000 acres of farmland, an Ag retail operation, an Ag drainage business and our son has a 500 head cattle feedlot operation.

We are part of the small businesses that made this country. We employ 12 full-time employees divided between the different entities. We also employ part-time help seasonally. For years, we have felt that Anti-Trust laws were not protecting our family operated Ag businesses.

EXPORT HOUSES
When foreign companies align themselves with grain export houses, they don't have to offer competitive prices for our products. We need competition to keep prices competitive and allow for the average farm operation to have a profit. More grain dealers, more export houses, more packers, more fertilizer and chemical import companies are needed to keep the American farm engine running. We need free trade to keep our costs sustainable.

If export houses are monopolized along the Mississippi and other waterways, I can no longer bid multiple locations and discern competitive pricing. If the 48 Bunge elevator sales go through it greatly reduces our competition for bids. By Zen-Noh purchasing those elevators, they no longer have to bid competitively from other export houses controlling a large market share. From where we sit on the farm, it appears they are exploiting grain merchandisers by limiting competition.

This isn't the only industry that we see Anti-Trust laws not being honored.

CATTLE INDUSTRY
As we look at the cattle industry. There are basically 3 packers left. JBS, the Brazilian-owned and controlled packer is profiting $1000 per head right now while the producer is losing $200-$400/ head because our government has let the packers monopolize this industry. They don't have to bid up on cattle because they know they are the only game in town.

FERTILIZER AND CHEMICAL INDUSTRIES
Another instance is the fertilizer and chemical industry. The same thing has been allowed to happen, being controlled by 3 major companies. Last season we did have some relief because of foreign imports of fertilizer. However the MOSAIC company complained, filed a law-suit to lessen import by implementing strong tariffs. Our government officials

went along with it without regard to the family farmer's struggle with prices. In less than a year, phosphorus fertilizer prices went from $285/ ton FOB Dubuque, Iowa on the Mississippi to $645/ton. That is a 227% increase in less than 12 months.

SEED AND GRAIN INDUSTRIES

Another Ag sector being controlled is the seed industry. Foreign countries are buying up small and large seed companies. Look at Bayer (German owned), Syngenta (China owned), all monopolizing this critical industry while our government allows foreign ownership and control.

NON-PROFIT ORGANIZATIONS

Another thing happening in our area and across the United States is the activity of allowing Non-profit organizations to buy farmland. Non-profit organizations do not pay the state or federal taxes the average farm operation has to pay. Locally we are seeing the Latter Day Saints Church (Mormon) buying tillable and production farmland under the operating name of Deseret Trust Company. Other Non-profit entity names the Mormon church controls include Farm Reserve Incorporated. We have several young farmers in central Iowa trying to either get into farming or buy enough land to grow their operation large enough to sustain the business. They can not bid and win against these large Non-profits and their seemingly unlimited funds.

As you are probably aware, Bill Gates controls another Non-profit owning and controlling exorbitant amounts of farmland. These groups buy the land, raising the cash rent so high the young and local farmer can not get a foothold. It is a rare bank that is going to go along with the risk associated with a young farmer paying higher cash rent than is profitable.

We, as local farmers, have to compete with these Non-profits and it is not a level playing field.

Non-profits are milking our state and federal governments out of approximately $100-$150/ acre per year of state and local taxes. By our accounts, because these Non-profits do not pay the local and state taxes, their burden is passed along to the local farmer, smaller communities and rural areas.

It is time for an investigation into these Non-profit organizations

STEEL INDUSTRY

Previous administrations have stopped foreign imports which caused Us steel prices to skyrocket as major suppliers were only in our country. This lack of competition has doubled the steel price - leading to increased burden on farming operations. We need both. We support competition.

Finally, please stop allowing our country to be sold piece by piece to foreign entities. It seems of national interest that foreign ownership of our resources is unwise for economic and security reasons. Family-owned, hard-working Ag business are giving up the fight and giving in to the pressure of foreign ownership and the dollars it represents. We support legislation that would limit foreign investors ownership and control of American farmland and the inputs to support the industry around it.

From where we sit, it would be easy to believe that large corporations are allowed to merge with other conglomerates to the benefit of the individuals, governments and share-

holders while Americans are unprotected even though Anti-Trust laws have been established but seemingly unenforced and ignored.

Please understand the need to open up imports and free trade! We as farmers have to compete with our products being exported to foreign markets, while our side has controlled input prices by tariffs being leveled by our government siding with big business. We see the economic impact of our government allowing monopolies without regard to Anti-Trust laws.

I invite more discussion on these matters. Feel free to call my cell [redacted]. I also want to personally invite you to be on the grounds of our small business and operations. I would welcome the conversation.

Thank you,

Mark Calmer
[Redacted]

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